226.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

THE AMERICAN REFRIGERATOR TRANSIT COMPANY,
Plaintiff in Error,
vs.
FRANK HALL, TREASURER OF ARAPAHOE COUNTY, COLORADO,
Defendant in Error.

No. 226.

IN ERROR TO THE SUPREME COURT OF COLORADO.

STATEMENT AND BRIEF OF PLAINTIFF IN ERROR.

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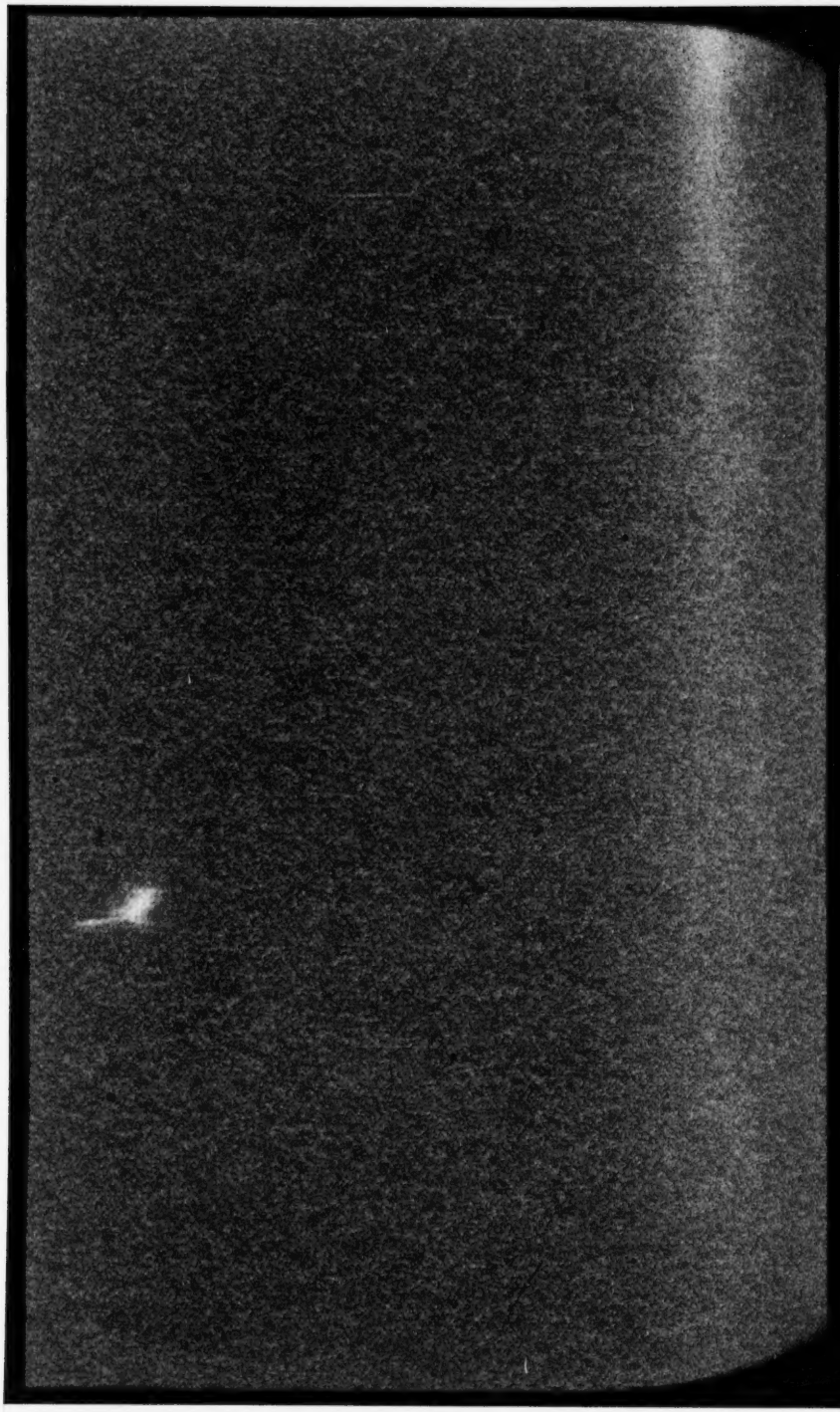

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STATEMENT AND BRIEF OF PLAINTIFF IN ERROR.

This was an action brought by the American Refrigerator Transit Company, the plaintiff in error, to have declared null and void, and to restrain the collection of, a certain property tax levied against it in Arapahoe County, Colorado, on an assessment of the Board of Equalization of that State to plaintiff in error of 42 cars at a valuation of $250 each, and distributed to the different counties through which the line of railway extended, upon which said cars were run, according to the mileage in said counties re-

spectively. Of such assessment $750 was distributed to Arapahoe County, upon which a tax of $21.63 was levied by the local authorities.

The cause was submitted to the District Court of Arapahoe County upon an agreed statement of facts, which court found in favor of plaintiff in error, and rendered a decree granting the relief prayed for. This decree was, on writ of error, reversed by the Supreme Court of the State, and the case is here on a writ of error from that judgment.

Inasmuch as the issues of fact raised by the petition and answer were settled by an agreed statement of facts, it will be unnecessary to abstract the pleadings.

The material facts agreed upon, and upon which the cause was decided, are, as follows:

1st. The American Refrigerator Transit Company is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal office in the city of East St. Louis, in said State, and was engaged in the business of supplying refrigerator cars for the transportation of perishable products over the various lines of railroad in the United States.

2d. That the cars in question were the sole and exclusive property of plaintiff in error, and were furnished to shippers of perishable freight to be run indiscriminately over any lines of railroad the shippers, or railroads requesting them, on behalf of the shipper, might choose to route them.

3d. Plaintiff in error had no contract of any kind by which its cars were leased, allotted to or by which it agreed to furnish its cars to any railroad company operating within the State of Colorado; nor

had it an office or place of business, or property other than its cars, within said State.

4th. That all the freight transported in plaintiff's cars in or through the State of Colorado, including the cars assessed, was transported in such cars either from a point or points in a State of the United States outside of the State of Colorado, to a point in the State of Colorado, or from a point in the State of Colorado to a point outside of said State, or between points wholly outside of said State of Colorado, and said cars never were run in said State in fixed numbers nor at regular times, nor as a regular part of particular trains, nor were any certain cars ever in the State of Colorado except as engaged in such business aforesaid, and then only transiently present in said State for such business.

The agreed facts further showed that these refrigerator cars were more expensive than the ordinary box freight car; that they were furnished to shippers on the responsibility of the railroad companies as carriers, who paid a mileage for their use; that owing to the varying and irregular demands for such cars these railroad companies had not deemed it profitable to build and own them, but that such cars were necessary for the transportation of perishable freight, such as fruits, meats and the like.

It was also agreed that the average number of cars of plaintiff in error, used in the course of business described within the State of Colorado for the year for which the assessment complained of was made, would equal forty, and that the valuation of $250 per car was not excessive.

The sole question of law raised was as to the jurisdiction of the State to tax the cars of plaintiff in error so used as agreed, plaintiff in error insist-

ing that the cars having no *situs* within the State their taxation by the State authorities would amount to a regulation of inter-state commerce, and thus be repugnant to the exclusive power vested in Congress to regulate such commerce.

SPECIFICATION OF ERROR.

1. The Supreme Court of Colorado erred in holding that the property in controversy had an actual *situs* within the State of Colorado, and was at the time for which the tax in question was levied within the jurisdiction of the taxing power of that State and taxable under its constitution and laws.

2. Said State court erred in deciding against the claim set up by plaintiff in error that the cars in question were in the State of Colorado only transiently and engaged exclusively in the business of inter-state commerce, and that such taxation was in violation of Art. 1, Sec. 8, of the the Federal Constitution, granting to Congress the power "to regulate commerce * * * among the several States."

3. The said State court erred in giving judgment for the defendant in error, when by the law of the land judgment should have been given for the plaintiff in error.

POINTS.

I.

The cars of plaintiff in error, under the agreed facts, acquired no *situs* in the State of Colorado, for the purposes of taxation.

Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18.
Pickard v. Pullman, 117 U. S. 34.
Pullman v. Nolan, 22 Fed. Rep. 276.
Cent. R. R. v. State Board, 49 N. J. L. 11.
Bain v. Railroad, 105 N. C. 363.
Marye v. B. & O. R. R. Co., 127 U. S. 117.
Morgan v. Farham, 16 Wall. 471.
Hayes v. Pac. Mail St. Co., 17 Wall. 596.
St. Louis v. Wiggins Ferry Co., 11 Wall. 423.
Coe v. Errell, 116 U. S. 517.
Crandall v. State of Nevada, 6 Wall. 35.
Robinson v. Longley, 18 Nev. 71.
State *ex rel.* v. State Board (unreported), S. C. Mo., Dec., 1898.

II.

A State cannot tax the vehicles employed exclusively in connection with inter-state commerce where such vehicles have no *situs* within such State.

Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18.
Phila. St. Co. v. Pennsylvania, 122 U. S. 346.
Corfield v. Coryell, 4 Wash. C. C. 379.
Erie Ry. Co. v. N. J., 2 Vroom. 531.
Brown v. Maryland, 12 Wheat. 449.
Passenger Cases, 7 How. 458.
State Tax on Railways Gross Receipts, 15 Wall. 292.
Fargo v. Michigan, 121 U. S. 230.
State *ex rel.* v. State Board (unreported), S. C. Mo. Dec. 1898.

ARGUMENT.

The tax in question is a direct property tax. If held valid it must be on the ground that the property taxed had a *situs* within the State of Colorado at the time the tax was assessed.

The railway cars in question in this case were situated with reference to the State of Colorado, as were the cars of the Pullman Co. in the case of Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18, *with this important exception*, that in that case the cars in question were furnished to railroad companies, under contracts entered into between the car owner and the railroad companies, and "*were continuously and permanently employed in going to and fro upon certain routes of travel.*"

In the case at bar, as shown by the agreed facts (see Rec., p. 11), plaintiff in error "has not, and never has had, any contract of any kind whatsoever by which its cars are leased or allotted to, or by which it agrees to furnish its cars to any railroad company operating within the State of Colorado." "The cars herein referred to are the sole and exclusive property of the plaintiff, and that plaintiff furnishes the same to be run indiscriminately over any lines of railroad over which shippers or said railroads may desire to route them in shipping, and furnishes same for the transportation of perishable freight upon the direct request of the shippers or the railroad companies requesting the same on behalf of shippers." (Rec., p. 11.)

And again in the Pullman case this court found that that company "has at all times substantially the same number of cars within the State, and con-

tinuously and constantly uses there a portion of its property; and it is distinctly found, as a matter of fact, that the company continuously, throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the State." (141 U. S. p. 26.)

In the case at bar it is agreed that "said cars never were run in said State in fixed numbers, nor at regular times, nor as a regular part of particular trains, nor were any certain cars ever in the State of Colorado, except as engaged in the business aforesaid [*i. e.*, inter-state commerce], and then only transiently present in said State for such purposes." (Rec., p. 15.)

Here we have the distinguishing features between the case at bar and the Pullman case, reported in 141 U. S. They are alike, in that both cases involve a property tax on railway cars used exclusively in inter-state commerce business. They are unlike in that the Pullman cars had a *situs* in Pennsylvania by virtue of contracts which made them a regular part of the equipment of the lines of railway upon which they were continuously run; whilst the cars of plaintiff in error are run indiscriminately at the behest of shippers over any routes selected for their routing, and are never in the State in fixed numbers, but follow the ebb and flow of the currents of commerce.

The cars of plaintiff in error, which were taxed in the State of Colorado, were there under exactly the same circumstances as the cars of any of the foreign railway companies of the United States, which passed into, through and out of the State during

the same period, in the usual course of the interchange of railway cars in through inter-state shipments.

The Supreme Court of Colorado held the tax in question valid seemingly on two grounds: first, that "The effect of our legislation is to give to the cars a *situs* for the purpose of taxation," and second, because: "The *status* of the cars in question was also substantially like that of those under consideration in Pullman Palace Car Co. v. Pennsylvania." (Rec., pp. 23, 24.)

As to the first of these grounds we have only to say that if it be held that the States have power to determine the question of *situs* by legislation, then we throw up our hands. This court has repeatedly decided that the mere fact that property is employed in inter-state commerce, does not exempt it from taxation by the State in which it has an actual *situs*. If the State legislatures have power to decide what shall constitute *situs*, then the power of Congress to regulate inter-state commerce must be given over to the States. We do not think this proposition will be seriously insisted upon by the learned counsel for defendant in error.

The serious question in this case is whether, as the Supreme Court of Colorado concludes, the cars of plaintiff in error, under the agreed facts in this case, acquired a *situs* in the State of Colorado substantially like the Pullman cars in the Pennsylvania case.

The agreed facts state that "the average number of cars of the plaintiff used in the course of the business aforesaid within the State of Colorado, during the year for which such assessment was made, would

equal forty, and that the cash value of plaintiff's cars exceed the sum of $250 per car, and that if such property of the plaintiff is assessable and taxable within such State of Colorado, then the amount for which such cars, the property of plaintiff in error, is assessed by said State Board of Equalization is just and reasonable, and not in excess of the value placed upon like property within said State for the purposes of taxation."

As clearly appears from the nature of the issues and its position in the agreed statement, this statement in regard to the average number of cars was inserted for the purpose of eliminating from the case any question as to the justness of the amount of the assessment, it being the desire of both parties to obtain a decision as to the power of the State board to assess this property. It is obvious, however, from the whole statement of facts, that *in the nature* of things there must have been such a thing as *an* average number of cars in the State during a given year, and if it were practicable to obtain for the year a statement from every railroad in the State as to what of plaintiff in error's cars, each day, were in transit through the State, the total divided by 365 would give *some* average. It is not stated that plaintiff in error had an average number of 40 cars within the State of Colorado *throughout* the period in question, but *during* that period. The agreed facts show that the cars were never in the State at any regular times, nor in any fixed numbers * * * "nor were any certain cars ever in the State of Colorado except as engaged in such business aforesaid," *i. e.*, except as requested by shippers, or by railroads on behalf of shippers.

In the Pullman case this court predicated its decision upon the statement that "the company has *at all times* substantially the same number of cars within the State, and continuously and constantly uses there a portion of its property, and it is distinctly found, as a matter of fact, that the company, *continuously throughout* the periods for which these taxes were levied, carried on business in Pennsylvania and had about one hundred cars within the State." (141 U. S. p. 26.)

The Supreme Court of Colorado, in its opinion sustaining the validity of the tax in this case, likens the *status* of plaintiff in error's cars to the cars in question in the Pullman case, "in that there was an average number in use within the State during the period for which the tax was levied," and says, "and we think that under the reasoning of that case they were subject to taxation in this State."

The reasoning by which this court reached its conclusion in the Pullman case is not difficult to state. It is as follows:

1. Property used exclusively in inter-state commerce is not, by reason of this fact alone, exempt from taxation in a State in which it has a *situs*.

2. Property which is kept and habitually used, continuously and permanently, in a State, has a *situs* in the State.

3. The Pullman cars, though used exclusively in inter-state commerce, being continuously and permanently used in the State, along certain definite routes of travel, are taxable, and it is immaterial that occasionally particular cars are removed and replaced by others, the average number being the same throughout the period of taxation.

Or, as summed up by Mr. Justice Bradley in his dissenting opinion in that case: "It seems to me that the real question in the present case is as to the *situs* of the cars in question." (p. 34.) * * * "The opinion of the court is based on the idea that the cars are taxable in Pennsylvania because a certain number *continuously abide* there."

A mere statement of this reasoning shows the glaring *non-sequitur* into which the Supreme Court of Colorado has allowed itself to fall. The agreed facts in this case *distinctly negative* the idea that any fixed or average number of plaintiff in error's cars were continuously, permanently or habitually kept or used in the State of Colorado throughout the period for which the taxes in question were levied. "And said cars never were run in said State in fixed numbers, nor at regular times, nor as a regular part of particular trains, nor were any certain cars ever in the State of Colorado except as engaged by such business aforesaid, and then only transiently present in said State for such purposes." (Rec., p. 15.)

And it was not alone because the Pullman Company used *an average* number of cars in the State of Pennsylvania throughout the year, that the tax was held valid, but because they so used them in a particular manner, to-wit: *habitually* and *continuously* under contract along certain routes within the State.

We think the true rule with respect to the *situs* of rolling stock used on railways in States other than that of the domicile of the owners, is correctly deduced from the adjudicated cases by Messrs. Prentice and Egan in their recent work on "The Commerce Clause of the Federal Constitution," as

contained in the following statement: "Vehicles of transportation by land, *used constantly and continuously upon a single run*, may therefore acquire a *situs* for taxation, independent of the domicile of the owner, and such *situs* is not destroyed by the fact that the owner, having many vehicles of like character, and lines in various parts of the country, from time to time transfers vehicles from one line to another, *provided constant and continuous use is preserved upon a single run.*" (Chicago, 1898, pp. 251, 252.) See also Pullman Palace Car Co. v. Twombley, 29 Fed. Rep. 658.

It must be borne in mind that since the presence and use of the cars of plaintiff in error in the State of Colorado during the period in question, as shown by the agreed facts, is identical with that of the freight cars belonging to all railway companies, other than those operating railroads in the State of Colorado, in the ordinary course of the interchange of cars incident to "through" shipments, to sustain the tax in question in this case is to say that the cars of the Baltimore & Ohio Railroad Co., for example, which in the course of interstate shipments run from New York to California, are taxable in each State through which they pass. The ownership of the cars is, of course, immaterial so far as the question of *situs* is concerned—whether the cars are owned by a fast freight line, as in the case at bar, or a brewery, or a packing house, or a railroad company, the use in a particular State is identical.

SITUS.

The idea of *permanency* is as inseparable from that conveyed by the word *situs*, in connection with propositions regarding taxation, as the idea of anything "temporary" in character is opposed thereto. The commercial traveler who to-day descends on Pittsburg, with his sample trunks, tomorrow on Chicago, the next day on St. Louis, and so on through the different States in the Union until he gets to San Francisco, would be surprised to learn that his trunk had acquired a *situs* for the purposes of taxation in each of the States in which he had stopped in the course of his journey. An attempt to tax a traveling circus, going from State to State, met with a prompt check in Robinson v. Longley, 18 Nev. 71. To acquire a *situs* in a State, property must be *located*, *i. e.*, commingled with the general mass of property in the State. Since the foundation of our government it has been held that a mere transient, or property merely in transit, through a State, was not taxable by such State. The original articles of confederation provided that "the people of each State shall have free ingress and egress to and from any other State," and such right is held involved under the present Federal Constitution in the "privileges or immunities" secured to citizens of the United States.

Crandall v. State of Nevada, 6 Wall. 35.

We admit freely the right of a State to tax all subjects "within its jurisdiction," but the question remains: *what is within its jurisdiction?* A reference to a few of the decisions of this court will make this

plain. In Leloup v. Mobile, 117 U. S. 640, it is said: "This exemption of inter-state and foreign commerce from State regulation does not prevent the State from taxing the property of those engaged in such commerce, *located within the State*, as the property of other citizens is taxed."

In Marye v. B. & O. R. R. Co., 127 U. S. 117, it is said: "If the Baltimore & Ohio Railroad Company is permitted by the State of Virginia to bring into its territory, and there to *habitually use and employ* a portion of its movable personal property, and the railroad company chooses to do so, it would certainly be competent and legitimate for the State to impose the burden of taxation imposed upon other similar property *used in the like way by its own citizens.*"

In Pullman Southern Car Co. v. Nolan, 22 Fed. Rep. 276, Justice Matthews, who wrote the opinion in the case last cited, says, speaking of sleeping cars: "They are not brought into the State for the purpose of being employed in a business carried on within it, and do not become a part of the mass of property within the jurisdiction of the State for the purposes of taxation." (We submit, with all due respect to the court whose opinion is under review, that this definition of *situs* is just as sound as it would have been had it been announced in a case involving a "property" instead of a "privilege" tax.)

And so the various cases cited defining *situs* abound with such expressions as property which "*abides* within the State," or "forms a part of its personal property," or becomes "blended in the business" in the State, or "incorporated with the

other personal property" of the State, or becomes "part of the common mass of property therein." All of these definitions involve the idea of permanency of location. And it was for the reason that the cars involved in the Pullman-Pennsylvania case, and Marye v. B. & O. R. R. Co., were found to have been brought into the States for permanent local use, that they were held to possess an *actual situs* in the States respectively.

The distinction which this court was careful to draw, in deciding the case of *Pullman v. Pennsylvania, supra*, between ships on the high seas or water, highways and railroad equipment continuously used along a definite route in a State, gives us perhaps the best definition as to what constitutes *situs* for purposes of taxation, to be found in the books. This court says (p. 23 of 141 U. S.): "Ships or vessels, indeed, engaged in inter-state or foreign commerce upon the high seas, or other waters which are a common highway, and having their home port, at which they are registered under the laws of the United States, at the domicile of their owners in one State, are not subject to taxation in another State at whose ports they incidentally or temporarily touch for the purpose of delivering or receiving passengers or freight. *But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual situs within its jurisdiction, and, therefore, can be taxed only at their legal situs, their home port and the domicile of their owners.*"

The domicile of plaintiff in error is Illinois; that is the "home port" of its cars; there its entire property is taxable; its cars "incidentally or tem-

porally touch" the State of Colorado in the course of their inter-state journeys; "they are not in any proper sense abiding within its limits, and have no continuous presence or actual *situs* within its jurisdiction," since the agreed facts show that, "plaintiff has not and never has had any contract of any kind by which its cars are leased or alloted to, or by which it agrees to furnish its cars to any railroad company operating within the State of Colorado; that it has and has had during said time no office or place of business, nor other property than its cars within the State of Colorado, and that all the freight transported in plaintiff's cars in or through the State of Colorado, including the cars assessed, was transported in such cars, either from a point or points in a State of the United States outside of the State of Colorado to a point in the State of Colorado, or from a point in the State of Colorado to a point outside of said State, or between points wholly outside of said State of Colorado, and said cars never were run in said State in fixed numbers, or at regular times, nor as a regular part of particular trains, nor were any certain cars ever in the State of Colorado, except as engaged in such business aforesaid, *and then only transiently present* in said State for such purposes. That owing to the *varying* and *irregular demands* for such cars, the various railroad companies within the State of Colorado have not deemed it a profitable investment to build or own cars of such character, and therefore relied upon securing such cars when needed from the plaintiff or corporations doing a like business."

We are duly impressed with closing paragraph of the opinion of this court on the rehearing of the

case of Adams Express Co. v. Ohio, 166 U. S. 185-225, which is as follows: "In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are and as possessing a value which is accorded to them in the markets of the world, and that no fine spun theories about *situs* should interfere to enable these large corporations, whose business is carried on through many States, to escape from bearing in each State such burden of taxation as a fair distribution of the actual value of their property among those States require." But we submit that not only do we present here no "fine spun" theory in regard to the *situs* of the property here in question, but have appealed only to the definitions which have again and again been announced and applied by this court, and we respectfully insist that to hold, as the Supreme Court of Colorado has held in this case, that under the agreed facts herein the property in question had an *actual situs* in Colorado, is equivalent to holding that the same tangible property may have an *actual situs* at the same time, in every State in the Union, and thus to *construct* a fine spun theory of *constructive situs* which has as yet never been recognized or suggested by any court in the Union, and "in this eminently practical age" we feel confident never will meet with the sanction of this court.

We are glad to be able to refer the court to the opinion of the Supreme Court of Missouri, which has just been handed down (December 13th, 1898), which declares unconstitutional an act of the Legislature of that State passed in 1895, which was specially framed to accomplish just what was attempted by the State Board of Equalization in this case,

which opinion fully sustains the position which we have taken in this brief. The opinion is as yet unreported (as this goes to press) and we refrain from quotations therefrom.

THE REGULATION OF INTER-STATE COMMERCE.

We understand the well settled law to be that the mere fact that personal property is employed in inter-state commerce, does not prevent its being taxed in a State in which it has a *situs*, like other personal property within its jurisdiction. The fact that the cars of plaintiff in error in this case are used exclusively in inter-state commerce, affords alone a ground of jurisdiction of this court in this case.

In the original complaint, upon which this case was submitted to the District Court of Arapahoe County, the following allegations are made (Rec., p. 2):

"Plaintiff further alleges that the business in which said cars, including the cars hereinafter mentioned, are and were during the said times engaged, and was exclusively inter-state commerce business, being confined to the interchange of perishable products of the various parts of the United States."

"Plaintiff further alleges that the plaintiff has and has had no office or place of business within the State of Colorado, and that all the freight transported in plaintiff's cars in or through the State of Colorado, including the cars hereinafter mentioned, was transported either from a point or points in a State of the United States outside of the State of Colorado to a point within the State of Colorado, or

from a point in the State of Colorado to a point without said State, or between points wholly outside of said State of Colorado; and that said cars are and were in said State of Colorado at no regular intervals nor in any regular number, and when in said State of Colorado are and were only within said State in transit, except to load and unload freight shipped from within and out of the State, or going into the State from without, and then only transiently present for the said purpose."

These facts are all admitted in the agreed statement of facts. (Rec., p. 11.)

The statement of facts as embodied in the bill for injunction in the case of Fargo v. Michigan, 121 U. S. 230, so far as relates to the use of complainant's cars, is almost identical with the facts we have here. In that case the tax was upon the gross receipts derived from the use of the freight cars of complainant in the State of Michigan, instead of on the cars themselves, as here. This court likens that case to that of Pickard v. Pullman Southern Car Co., 117 U. S. 34, and says; "In that case, after an exhaustive review of the previous decisions in this class of cases by Mr. Justice Blatchford, who delivered the opinion of the court, it was held that, *as these cars were not property located within the State*, it was a tax for the privilege of carrying passengers in that class of cars through the State, which was inter-state commerce, and for that reason the tax could not be sustained."

Whether a given tax be a direct tax upon property, or an indirect tax falling more remotely thereon, by being based upon its use, the effect so far as the tax constituting a burden is concerned, is

the same. And where the property is used exclusively as an instrumentality of inter-state commerce, the tax becomes a burden on that commerce, whether directed against the property or the uses. As said by this court in Brown v. Maryland, 12 Wheat. 449: "All must perceive that the tax on the sale of an article imported only for sale is a tax on the article itself."

And as said by Mr. Justice Grier in the Passenger Cases, 7 How. 458: "We have to deal with things, and we cannot change them by changing their names. Can a State levy a duty on vessels engaged in commerce and not owned by her citizens, by changing its name from "a duty on tonnage" to a tax on the master, or an impost on imports by calling it a charge on the owner or supercargo, and justify the evasion of a great principle by producing a dictionary or a *dictum* to prove that a ship captain is not a vessel, nor a supercargo an impost."

If a State is permitted to impose whatever tax it pleases on the cars by means of which inter-state commerce is carried on, of what avail is it that it is not permitted to impose a license tax for the privilege of doing the business, or impose a tax on the gross receipts of the business.

It would seem that it could not even be plausibly contended that had the Michigan statute, which was involved in the case of Fargo v. Michigan, *supra*, imposed a direct tax on the average number of complainant's cars used annually in the business described, instead of on the gross receipts arising out of such use, it would have been held that such tax was legal and valid. As was remarked by Justice Miller in State Tax on Railway Gross Receipts, 15

Wall. 292: "It seems to me that to hold that a tax on freight is within it (*i. e., the commerce clause of the Constitution*), and that on gross receipts arising from such transportation is not, is "to keep the word of promise to the ear and break it to the hope." Yet the Michigan statute so framed would have given rise to the precise question presented by the case at bar for decision.

The Supreme Court of North Carolina has in the case of Bain v. Richmond & Danville R. Co. (105 N. C. 363), so well stated the law with reference to the restrictive effect of our Federal Constitution on the power of States in the taxation of property used in inter-state commerce, that we feel that we cannot do better than to transcribe here what is there said:

"If the State were absolutely sovereign in all respects, it might tax property coming into it temporarily from another State for the purposes of trade, or property passing across its territory from one State to another or other States in the course of trade, travel and commerce. It might tax such trade and travel, in the discretion of its legislature. But as a member and constituent part of the Federal Union, it does not possess unlimited powers of taxation as to all property, matters and things that might otherwise be deemed and made subjects thereof. It and its authorities, including its courts of justice, are bound by that constitution; and it is its and their duty to observe, administer and enforce its provisions in proper cases and connections, as much so as its own constitution and laws. Indeed, the Constitution of the United States is a part of the organic law of this State; and, in principle and theory, there is not, and cannot be, any conflict between the Constitution and Laws of the United States and the same of this State. If conflict, in fact, exists in any respect as, unhappily, is sometimes the case, it is so because those who determine what the law is, administer and enforce it, are ignorant of or misapprehend its true meaning and application, or willfully disregard and disobey it."

"A leading and very important purpose of the Federal Union was to establish and secure the freedom of trade and commerce, both foreign and domestic, and particularly, for the present purpose, between and among the several States comprising it. To this end it is provided, in its Constitution (Art. 1., Sec. 8, par. 3) that 'The Congress shall have power * * * to regulate commerce with foreign nations and among the several States, and with the Indian tribes.' The power thus con-

ferred is indefinite as to its scope and capable of very latitudinous interpretation and exercise, particularly as it is part of the organic law, and the subject to which it relates is one of great breadth and compass. It is difficult to determine its just limit in many respects; but it should receive a reasonable interpretation, such as will effectuate the purpose contemplated, trenching as little as practicable upon the powers, rights and convenience of the States. Very certainly the provision implies that Congress should regulate such commerce, and the States shall not; that Congress shall do so effectually, in such way and by such means as will secure, promote and encourage the same, and that the States shall not, if disposed to do so, interfere with, destroy, hinder or delay the same, or divert it in any way, by any legal constraint, for their own advantage otherwise than to a very limited extent, as allowed by the Constitution. Hence it is settled that a State cannot tax commerce, trade, travel, transportation, or the privilege to carry on and conduct the same, or the vehicles, means and appliances employed and used in connection therewith, coming into that State from another temporarily, however frequently, and returning to such other State; nor can it tax such commerce, or such incidents thereto, passing across it from another or other States to another or other States, however often this may be done. And the reason is that to so tax such commerce, and the incidents thereto, including such means of transportation, would tend directly and have the effect in a greater or less degree and extent, to interfere with the freedom of commerce among and between the people of the States. It would have the certain effect to embarrass, hinder and delay the free course of such trade. If a State could thus tax such commerce at all, it might, in its discretion, for its own benefit and advantage, tax it so heavily as to practically destroy it within its own borders, and in possible cases prevent it from passing freely into other States. Moreover, if one State might tax it, every State through which it passed might do so likewise; and thus the power of Congress to regulate interstate trade and commerce would be nugatory, and a sheer mockery. It is clear that a State has no such power, and the Supreme Court of the United States has authoritatively so decided, directly and in effect, in many cases. Hay v. Southern Mail SS. Co., 17 How. (U. S.) 596; Morgan v. Parham, 16 Wall. (U. S.) 471; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 13 Am. & Eng. Corp. Cas. 365, and numerous cases there cited. Pickard v. Pullman Southern Car Co., 117 U. S. 34, 24 Am. & Eng. R. Cas. 511; Leloup v. Port of Mobile, 127 U. S. 640, 21 Am. & Eng. Corp. Cas. 26."

The uniform holding of this court is that no State has the right to lay a tax on inter-state commerce in any form; that taxation is a form of regulation; that if such power exist in the State, it is, of course, unlimited, and it is a power which, if exercised,

cannot but embarrass and impede, if it does not destroy, such commerce. The regulation of such commerce belongs solely to Congress; in that matter "the United States are but one country, and must be subject to one system of regulations, and not a multitude of systems." (Robbins v. Shelby Taxing District, *supra.*) And admitting that personal property may have a *situs* other than that of the domicile of its owner, and that the mere fact that it is used in inter-state commerce is not sufficient to exempt it from State taxation, we claim that rolling stock, used exclusively as instrumentalities of inter-state commerce, and not continuously and habitually used in a State, nor confined to definite lines of railroad therein, is exempt from taxation in such State.

All of which is respectfully submitted.

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